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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 972

MELVILLE CONFECTIONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 31-37) is reported at 327 F. 2d 689. The Board's decision and order (Pet. 13-30) are reported at 142 NLRB No. 144.

JURISDICTION

The judgment of the court of appeals (Pet. 31, 37) was entered on January 29, 1964, and a petition for

rehearing was denied on March 3, 1964 (Pet. 42). The petition for a writ of certiorari was filed on April 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer violates Section 8(a)(1) of the National Labor Relations Act by maintaining a profit sharing plan for its employees which conditions participation upon the employees not being represented by a labor union for purposes of collective bargaining.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix to the petition (Pet. 11-12).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On June 30, 1958, the Company established a "deferred profit-sharing plan for eligible employees," effective as of July 1, 1957 (S.A. 5; P.A. 1).[1] In general, contributions to the plan are made only by the Company (S.A. 5). Under the plan, distributions are made at the severance, retirement, disability, or death

[1] References to the Board's appendix, printed at the end of its brief in the court below, are designated "B.A." References to the appendix printed at the end of petitioner's brief in the court below are designated "P.A." References to petitioner's supplemental appendix are designated "S.A."

of a "participant" (P.A. 7-8). A "participant" is defined as an "eligible employee" who has completed a certain number of months of continuous service in the Company's employ (P.A. 1-2). An "eligible employee" is in turn defined as "a regular fulltime employee of the Company, not represented by a union designated as the bargaining agent for the employee" (P.A. 1-2). The plan is administered by a committee appointed by the Company's board of directors (P.A. 4-6). The Company reserves the right to terminate the plan upon 30 days notice, and upon such termination the funds in the plan are to be distributed pro rata among the present and former participating employees (B.A. 2a). The Company may amend the plan at any time (*ibid.*).

The provisions of the plan relative to employee eligibility and participation have remained unchanged since the plan's inception and are presently in effect (S.A. 7; B.A. 1a). Beginning in 1957, and continuing to the present time, the Company has distributed to its employees a booklet entitled "Statement of Company Policies" (*ibid.*). Under item 10 ("profit sharing") of this booklet, the following paragraph is printed in bold face type (P.A. 9):

> Under the terms of the plan, an individual must be a fulltime employee and have had at least 1 year seniority prior to the start of any fiscal year, and can not be represented by any union or other outside bargaining agent, in order to share in any benefits for that year. This plan was established voluntarily by the Company and the Company reserves the right to discontinue it at any time.

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the above facts, the Board concluded (Pet. 21-22, 29) that the Company interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act by maintaining, throughout the 6-month period prior to the filing of the charge,[1] a profit sharing plan restricted by its terms to employees who were not represented by a labor union for purposes of collective bargaining. The Board's order (Pet. 24-26, 30) requires the Company to cease and desist from conditioning participation in any profit sharing plan upon the employees not being represented by a labor organization, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights of self-organization. Affirmatively, the Company is required to amend its profit sharing plan and its booklet in accordance with the Board's order, and to post appropriate notices.

C. THE COURT OF APPEALS DECISION

The court of appeals sustained the Board's findings, and enforced its order in full (Pet. 31-37).

ARGUMENT.

The decision of the court of appeals is clearly correct, and is not in conflict with the decisions of this Court or those of any other circuit.

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[1] The unfair labor practice charge was filed on September 18, 1962, by Local 329, United Services Employees Union (Pet. 12-13).

1. Petitioner's profit-sharing plan was in terms available only to those of its employees who were not represented by a union for collective bargaining. As the court below properly held (Pet. 35), such a plan by "its inherent nature * * * interfered with, restrained and coerced employees in the exercise of their right to be represented for collective bargaining by a labor organization"; it "placed a penalty on such action—a disqualification to participate in profit-sharing benefits." Contrary to petitioner's contention (Pet. 5-7), it was not necessary to establish that petitioner was motivated by a specific intent to abridge the employees' Section 7 rights. As this Court has explained, "specific proof of intent is unnecessary where [as here] employer conduct inherently encourages or discourages union membership." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 45. See also *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 228. Nor was it incumbent on the Board to prove that the plan in fact restrained or coerced specific employees in the exercise of their Section 7 rights. Such proof is not required where, as here, restraint or coercion is the reasonable tendency of the employer's action. *Radio Officers*, *supra*, at 51; *Hendrix Manufacturing Co.* v. *National Labor Relations Board*, 321 F. 2d 100, 105 (C.A. 5).

2. There is no substance to petitioner's contention (Pet. 7-9) that a finding of an unfair labor practice was barred by Section 10(b) of the Act. That Section prohibits any complaint based upon an unfair labor practice that occurred more than six months

prior to the filing of the charge with the Board. Since the profit sharing plan was instituted more than six months prior to the filing of the unfair labor practice charge, Section 10(b) precluded a finding that the institution of the plan was an unfair labor practice. However, since the plan on its face contained an illegal condition, its continued maintenance within six months of the filing of the charge and thereafter constituted an independent unfair labor practice which was provable without reference to events outside the limitations period imposed by Section 10(b). Accordingly, the Board could properly find that the continued maintenance of the plan constituted an unfair labor practice. *Local Lodge No. 1424 v. National Labor Relations Board*, 362 U.S. 411, is not to the contrary. There, unlike here, "[the] agreement and its enforcement [were] both perfectly lawful on the face of things"; thus, enforcement of the agreement could be found to be "a continuing *violation* solely by reason of circumstances existing only at the date of execution"—circumstances which were outside the Section 10(b) period. *Id.* at 419, 423, emphasis in original.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LAURENCE GOLD,
Attorney,

National Labor Relations Board.

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